Supreme Court, U.S.
FILED

09-719 SEP 30 2009

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

DANIEL KONAR - *Petitioner,*

v.

STATE OF ILLINOIS - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel Konar, Pro Se
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September 29, 2009

QUESTIONS PRESENTED

Petitioner, Daniel Konar, seeks a writ of certiorari to:

1. Challenge the Seventh Circuit's ruling that Daniel "failed to state a claim" under Title IX, and

2. Is a non-educational recipient of Title IX funds liable under for sex discrimination when it uses a Title IX program directly in operations that are sexually discriminatory?

3. Can the State's Attorney raise the Eleventh Amendment as a defense after the Legislative and Executive branches of the State passed a law expressly waiving the Eleventh Amendment.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORORI

Petitioner, Daniel Konar, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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The opinion of the United State Court of Appeals for the Seventh Circuit, Final Judgment, May,14,2009, is reproduced in.....App. 2

The opinion of the United State Court of Appeals for the Seventh Circuit, Order Reasons, May 14, 2009 is reproduced in..... .....App. 3

The opinion of the United States District Court for the Northern District of Illinois – Dismissed Amended Complaint, Filed Aug. 23, 2007 is Reproduced in..... .....App. 6

The opinion of the United States District Court for the Northern District of Illinois – Dismissed Original Complaint, Filed May 31, 2007 is reproduced in .....App. 8

None of the opinions are reported or published.

JURISDICTION

The court of appeals entered judgment in this case on May 14, 2009. Petitioner filed a timely petition for rehearing, not en banc, which the court of appeals denied on July 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ELEVENTH AMENDMENT to the UNITED STATES CONSTITUTION provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

20 USC Section 1681 provides:

No person in the United States shall, on the basis of sex...be subjected to discrimination under any...activity receiving Federal financial assistance.

20 USC Section 1687 provides:

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of -
(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government

Title IX

STATEMENT OF THE CASE

STATEMENT OF THE CASE

The State discriminated against Daniel in the administration of case 98 D 18934. Daniel was consistently denied due process based on sexual discrimination. Daniel was denied equal protection under the laws based on sexual discrimination. Daniel was denied his child based on sexual discrimination. This was most apparent when the State issued a custody order giving Daniel custody of his child every other week. This order was issued solely to discriminate against Daniel because he was the primary care giver for the minor child and the child was spending most of his time with Daniel. The State did not have a hearing to determine Daniel's fitness as a parent before issuing the order. The

State also did not show any cause for issuing the custody order or show that the child was ever in any danger from Daniel.

The State custody order was still in place years later when the mother just abducted the minor child. The child was taken in violation of the State's custody order and the State did not enforce Daniel's right to custody. The abduction was also in violation of Illinois criminal code for Child Abduction, 720 ILCS 5/10-5. This one act alone was so severe that it denied Daniel equal rights and equal access to the judicial operations after the child was taken.

Daniel did file 3 petitions based on prejudice so the State did receive notice of discrimination. The State also had an opportunity to correct the discrimination when Daniel filed his petition for an emergency hearing on child custody after the child was abducted. The State decided it would not hear

Daniel's petition before Daniel even filed it and the State never did hear Daniel's petition.

The fact that Daniel's child was taken from him without a trial, without a hearing, and without due process has never been denied by the State.

A year and a half after Daniel's child was taken Daniel file suit against the State in federal district court, February 1, 2007. After Daniel filed in federal court the State expedited case 98 D 18934. Since Daniel did not go along with the abduction of his

child the State ruled Daniel's action "egregious" and barred Daniel from ever seeing his child.

There were 3 separate judges on case 98 D 18934. The State's acted with intentional sexual discrimination. The State was notified numerous times of the discrimination, a fact that has not been denied by the State. The State had the opportunity to correct the discrimination but intentionally chose not to even hear Daniel's petition before he even filed it.

The State used the Title IX funded parenting educational program, Focus on Children, directly in the sexually discriminatory proceedings. The Focus on Children program is the program of the Cook County Circuit Court and was developed using Title IX funds. The program was under the direct control of the Cook County Circuit Court. Daniel was ordered to take the program and the program then used directly in the trial. The State used the Title IX funded program directly in operations which sexually discriminated against Daniel.

Daniel filed his original complaint, February 7, 2007, under the 1st, 5th, 9th, and 14th Amendments to the United States Constitution and Civil Rights Statutes. The State raised the Eleventh Amendment as a defense and the Court agreed and dismissed the complaint. Daniel filed an Amended Complaint, June 12, 2007, under:

a. 1st, 5th, 9th, and 14th Amendments to the U.S. Constitution, and
b. Article III, Section 2 of the U.S. Constitution. and

c. 28 U.S.C. § 1331, and
d. 42 USC 2000d, the Equal Rights Equalization Act, and Title IX, and
e. 28 U.S.C. § 1441 (b); and
f. 28 U.S.C. § 1343; and
g. 28 U.S.C. § 1367(a); and
h. 42 U.S.C § 1981; and
i. U.S. Supreme Court order Stanley v Illinois 405 U.S. 645, and
j. Universal Declaration of Human Rights, Adopted and proclaimed by United Nations General Assembly Resolution 217 A (III) of 10 December 1948, Article 16, and
k. Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna an 25 June 1993, Article 27

The State again raised the Eleventh Amendment as a defense and the district court agreed and dismissed Daniel's Amended Compliant with prejudice.

Upon appeal the State conceded that Title IX does waive the State's Eleventh Amendment right. The Appellate court AFFIRMED the district court dismissal but modified the reason to "failure to state a claim" stating Daniel "does not allege that an educational institution excluded him from participation, denied him benefits, or subjected him to sex discrimination within the context of the program itself, as would be necessary to state a claim under Title IX."

REASONS FOR GRANTING THE WRIT

A. TITLE IX – SEX DISCRIMINATION

Daniel's child was taken from him without a trial, without a hearing, and without due process. The abduction of a child during divorce proceedings is considered so offensive that the Legislative and Executive braches of government of the State of Illinois raised it to a felony level. The State was fully aware that when they used Title IX funds they would be liable for sex discrimination. The U.S. Supreme Court has made many rulings stating the rights of the parent, *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833, 926-927 (1992); also *Troxel v. Granville,* and that Daniel was entitled to due process before his child could be taken from him. *Stanley v. Illinois.* The State just allowed the child to be criminally abducted in intentional violation of Daniel's rights. The State had numerous opportunities to correct this discrimination but did not. If fact the State's position in its filings with the federal district court state that Daniel was not entitled to due process because Stanley was an unmarried father and Daniel is married. The State even now stands by its position of sex discrimination. Because of the Eleventh Amendment individuals have no rights against the State. When the State violates individual rights the individual can do nothing. When Congress passed the Title IX it intended for it to viewed in the same light as the Civil Rights Act of 1964. In fact Title IX borrows

some of the same language as the Civil Rights Act of 1964. President John F. Kennedy, when addressing racial discrimination address in the Civil Rights Act of 1964 stated that simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination. The same intent exists in

Title IX that public funds not be spent in any fashion which encourages, entrenches, subsidizes or results in sex discrimination. The State of Illinois did use a Title IX funds program directly in an operation which encourages, entrenches, and results in sex discrimination against Daniel. This case involves sex discrimination by government and there appears to be confusion in the lower Courts on how to address the issue when a non-education recipient is involved. The District Court dismissed the issue based on the Eleventh Amendment. The Appellate Court dismissed the issue because the was no claim of discrimination by an educational institution or educational program. The body of cases does not exist to address sex discrimination by the government.

B. THE STATE"S ELEVENTH AMENDMENT WAIVER IN THE ILLINOIS CIVIL RIGHTS ACT OF 2003

The State's Attorney advised the District Court that the State did not expressly waive its Eleventh Amendment right. However, the Legislative and Executive branches of the State did expressly waive the State's Eleventh Amendment right when it passed the Illinois Civil Rights Act of 2003 which states in relevant part:

(740 ILCS 23/5) Discrimination prohibited.

(a) No unit of State, county, or local government in Illinois shall:

(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender.

(b) Any party aggrieved by conduct that violates subsection (a) may bring a civil lawsuit, in a federal district court...against the offending unit of government.

The State conceded the waiver of the State's Eleventh Amendment right under Title IX and the Appellate Court did not rule on the Legislative waiver question. The Plaintiff is stating that the State's Attorney did not have the authority to raise the Eleventh Amendment as a defense after the Legislative and Executive branches of the State waived it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should reverse the decision below and remand it to the lower court for further proceedings and any other action which the Court deems just.

Respectfully submitted,

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App. 1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR	Appeal from the United States District
Plaintiff-Appellant,	Court for the Northern District of
v.	Illinois. Eastern
	Division
STATE OF ILLINOIS	No. 07 C 628
Defendant-Appellee	John W. Darrah, Judge

ORDER

(Filed July 2, 2009)

On consideration of the petition for rehearing, all of the judges have voted to deny rehearing. It is therefore ordered that the petition for rehearing is DENIED.

App. 2

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR	Appeal from the United States
Petitioner-Appellant,	District Court for
v.	the Northern District of
	Illinois, Eastern Division
STATE OF ILLINOIS	No. 07 C 628
Respondant-Appellee	John W. Darrah, Judge

FINAL JUDGMENT

(Filed May 14, 2009)

The judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified. The above is in accordance with the decision of this court entered on this date.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 11, 2009

Decided May 14, 2009

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR	Appeal from the United States
Petitioner-Appellant,	District Court for
v.	the Northern District of
	Illinois, Eastern Division
STATE OF ILLINOIS	No. 07 C 628
Respondent-Appellee	John W. Darrah, Judge

ORDER

(Filed May 14, 2009)

Daniel Konar sued the State of Illinois in federal court after he became unhappy with the course of a divorce and custody matter. Konar claims that rulings issued in that statecourt litigation have violated his constitutional rights. The district court dismissed the complaint on the basis of sovereign immunity. We affirm, but modify the judgment to reflect a dismissal for failure to state a claim. *See Richards v. Kiernan*, 461 F.3d 880, 886 (7th Cir. 2006).

The State of Illinois is the only defendant named in Konar's amended complaint. His lawsuit, filed shortly before judgment was entered in his divorce proceeding, accuses the State of depriving him of custody of his son without due process and engaging in gender discrimination. The State's conduct, according to Konar, violated his rights under the Constitution as well as Title IX of the Education Amendments of 1972, the UniversalDeclaration of Human Rights, and the Vienna Declaration and Programme of Action. As relief Konar asked that the district court exercise jurisdiction over his Illinois divorce case, declare the Illinois Marriage and Dissolution of Marriage Act unconstitutional, and award him $12 million in damages. The court had earlier dismissed Konar's first complaint on the ground that the State was immune from suit under the Eleventh Amendment, and at the State's urging,

the court dismissed the amended complaint on the same basis, this time with prejudice. Our review is de novo. *See Vill. of DePue, Illinois v. Exxon Mobil Corp.*, 537 F.3d 775, 782 (7th Cir. 2008).

In the district court the State argued that the entire complaint could be dismissed with prejudice under the Eleventh Amendment, but in this court the State retreats from that position. As the State now concedes, Title IX abrogates its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1); *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 554-55 (7th Cir. 2001), and that immunity, although intact for Konar's remaining claims, *see Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), would not have allowed dismissal *with prejudice* of nonfrivolous claims that might have been litigated in state court, *see Feldman v. Ho*, 171 F.3d 494, 498 (7th Cir. 1999). But dismissal with prejudice was still correct because Konar's complaint is frivolous. Except for the Title IX claim, the suit is premised on 42 U.S.C. § 1983, yet that statute does not authorize litigation against the states for violations of the Constitution or federal law, including treaty obligations. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Holton v. Ind. Horse Racing Comm'n*, 398 F.3d 928, 929 (7th Cir. 2005); *see also Jogi v. Voges*, 480 F.3d 822, 827-28 (7th Cir. 2007). Thus, a straightforward application of § 1983 resolves all but the Title IX claim, and the district court should have refrained from addressing the question of sovereign immunity. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529

U.S. 765, 779-80 (2000); *Holton*, 398 F.3d at 929. Moreover, Konar cannot state a claim under the Universal Declaration of Human Rights or the Vienna Declaration because both are non-binding declarations that provide no private rights of action. *See* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/ CONF.157/23 (July 12, 1993); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *Sosa v. Alvarez Machain*, 542 U.S. 692, 734 (2004) (explaining that Universal Declaration is simply a statement of principles and not a treaty or international agreement that would impose legal obligations); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 918 (2008) (noting that Vienna Declaration is "non-binding"). And to the extent that Konar claims a violation of Title IX in connection with a court ordered parenting class, he does not allege that an educational institution excluded him from participation, denied him benefits, or subjected him to sex discrimination within the context of the program itself, as would be necessary to state a claim under Title IX. *See* 20 U.S.C. § 1681(a); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999); *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 604-05 (7th Cir. 2008); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997).

Accordingly, the judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondant.

ORDER
07 C 628
(Filed Aug 23, 2007)

DOCKET ENTRY TEXT

On May 31, 2007, this Court granted Defendant's Motion to Dismiss for Lack of Jurisdiction. Plaintiff filed an amended complaint, purporting to state the basis for federal jurisdiction. However, Plaintiff has not overcome the Eleventh Amendment's procedural bar as fully explained in the Court's order of May 31, 2007. Thus, for the reasons set forth in this Court's May 31, 2007, Plaintiff's Amended Complaint is dismissed with prejudice. Defendant's Motion to Dismiss the Amended Complaint [24] is granted. The status hearing set for October 3. 2007, at 9:00 A.M. is vacated.

BY THE COURT:

/s/ John w. Darrah

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondant.

ORDER
07 C 628
(Filed Aug 23, 2007)

DOCKET ENTRY TEXT:

For the reasons set forth below, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, stating the grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice. Status hearing set for June 6, 2007 at 9:00 a.m. is vacated and reset to August 21, 2007 at 9:00 a.m.

STATEMENT

Plaintiff, Daniel Konar, proceeding Pro Se, filed a Complaint against the Defendant, the State of Illinois. The gravamen of the Plaintiff's Complaint is his assertion that the Defendant conspired to take the minor son from his custody without a trial, a

hearing, or due process in violation of the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and other unnamed, civil rights statutes. The Complaint also asserts that the State of Illinois allowed the libel and slander of the Plaintiff. Plaintiff seeks injunctive relief and compensatory and punitive damages. Currently before the Court is the Defendant's Motion to Dismiss for Lack of Jurisdiction on the basis of state sovereignty.

The federal courts are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) have been entrusted to them by a jurisdictional grant by Congress. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.") The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. LeHigh Mining & Mfg. Co. Kelly, 160 U.S. 327, 337 (1895). Thus, it is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the decision. Cook v. Winfrey, 141 F.3d 322, 325 (7th Cir. 1998).

Here, the Plaintiff has sued the State of Illinois. The Eleventh Amendment's sovereign immunity clause expressly precludes federal courts from exercising

jurisdiction over any law or equity claims, unless a state consents to suit or unless Congress overrides the Eleventh Amendment by specifically legislating under constitutional grant of authority. *Tenn Student Assistance Corp. Hoo*, 541 U.S. 440, 446 (2004); *Pennhurst St. Sch. V. Halderman*, 465 u.S. 89, 100-01 (1984) (*Pennhurst*). The sovereign immunity clause bars federal district courts from adjudicating suits brought by private litigants against states or their agencies. *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994) (Garcia); see also *Fayemi v. Pucinski*, 155 F. Supp.2d 944, 948 (N.D. Ill. 2001) ("the Eleventh Amendment bars federal courts from exercising jurisdiction over actions brought by a citizen against a state, a state agency, or state official").

Here, Plaintiff's suit appears to be brought under 42 U.S.C. § 1983. Generally, under 42 U.S.C. § 1983, a plaintiff may be granted relief where he has been deprived rights or privileges secured for him by the Constitution and law. The application of the statute is limited in scope in terms of who may be sued by a plaintiff and under what circumstances they may be sued. Thus, if Plaintiff's suit is brought under Section 1983, the Court lacks jurisdiction because the State of Illinois has not consented to be sued; and Plaintiff's Section 1983 claims present no Congressional override of the general prohibition against suit against states. The Plaintiff, however, in his Response, denies that his suit was brought under Section 1983 and assets that he is suing directly under Amendments to the Constitution and

pursuant to the general grant of jurisdiction to federal courts over federal questions, 28 U.S.C. § 1331. Plaintiff also asserts that the Defendant waived its immunity when, in the child custody proceeding before the Cook County Circuit Court, the Cook County judge "wanted to hear and did hear from an employee of School District 54" and "used that evaluation in the administration of the law of the State of Illinois" and ordered the child to be enrolled in a public school. Plaintiff asserts that such actions amount to a waiver of Eleventh Amendment immunity because the public school system is, in part, federally funded.

The Plaintiff's arguments do not change the underlying issue: the Court lacks jurisdiction over the Plaintiff's suit against the State of Illinois. Plaintiff's constitutional claims before this Court appear to be presented through 1983, which, for reasons stated above, do not warrant a waiver of sovereign immunity. Further, the Court's jurisdiction over federal questions, under Section 1331, does not abrogate the Eleventh Amendment. The Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 86 (1996), stated, "the underlying jurisdictional statute involved in this case, 28 U.S.C. § 1331, does not itself purport to direct federal courts to ignore a State's sovereign immunity." Thus, Plaintiff has not cited to any applicable federal statute that abrogates sovereign immunity in this case. Further, there has not been a valid waiver of Eleventh Amendment immunity. *Pennhurst* and its

progrny require that the state's consent to suit must be "unequivocally expressed." 465 U.S. at 99. Here, the Defendant, the State of Illinois, has not expressed its consent unequivocally.

For the foregoing reasons, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, if the Plaintiff can do so consistent with Federal Rule of Civil Procedure 11, stating proper grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice.

Supreme Court, U.S.
FILED

09-719 SEP 30 2009

No. ——OFFICE OF THE CLERK

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DANIEL KONAR - *Petitioner,*

v.

STATE OF ILLINOIS - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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December 1, 2009

APPENDIX

United States Court of Appeals for the
Seventh Circuit Order Denied Rehearing,
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Northern District of Illinois – Dismissed
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United States District Court for the
Northern District of Illinois – Dismissed
Original Complaint,
Filed May 31, 2007.....App. 10

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Plaintiff-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 07 C 628
John W. Darrah, Judge

ORDER

(Filed July 2, 2009)

On consideration of the petition for rehearing, all of the judges have voted to deny rehearing. It is therefore ordered that the petition for rehearing is DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Petitioner-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 07 C 628
John W. Darrah, Judge

FINAL JUDGMENT

(Filed May 14, 2009)

The judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified. The above is in accordance with the decision of this court entered on this date.

App. 4

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 11, 2009

Decided May 14, 2009

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Petitioner-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 07 C 628

John W. Darrah, Judge

ORDER

(Filed May 14, 2009)

Daniel Konar sued the State of Illinois in federal court after he became unhappy with the course of a divorce and custody matter. Konar claims that rulings issued in that statecourt litigation have violated his constitutional rights. The district court dismissed the complaint on the basis of sovereign

immunity. We affirm, but modify the judgment to reflect a dismissal for failure to state a claim. *See Richards v. Kiernan*, 461 F.3d 880, 886 (7th Cir. 2006).

The State of Illinois is the only defendant named in Konar's amended complaint. His lawsuit, filed shortly before judgment was entered in his divorce proceeding, accuses the State of depriving him of custody of his son without due process and engaging in gender discrimination. The State's conduct, according to Konar, violated his rights under the Constitution as well as Title IX of the Education Amendments of 1972, the Universal Declaration of Human Rights, and the Vienna Declaration and Programme of Action. As relief Konar asked that the district court exercise jurisdiction over his Illinois divorce case, declare the Illinois Marriage and Dissolution of Marriage Act unconstitutional, and award him $12 million in damages. The court had earlier dismissed Konar's first complaint on the ground that the State was immune from suit under the Eleventh Amendment, and at the State's urging, the court dismissed the amended complaint on the same basis, this time with prejudice. Our review is de novo. *See Vill. of DePue, Illinois v. Exxon Mobil Corp.*, 537 F.3d 775, 782 (7th Cir. 2008).

In the district court the State argued that the entire complaint could be dismissed with prejudice under the Eleventh Amendment, but in this court the State retreats from that position. As the State now concedes, Title IX abrogates its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1);

Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 554-55 (7th Cir. 2001), and that immunity, although intact for Konar's remaining claims, *see Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), would not have allowed dismissal *with prejudice* of nonfrivolous claims that might have been litigated in state court, *see Feldman v. Ho*, 171 F.3d 494, 498 (7th Cir. 1999). But dismissal with prejudice was still correct because Konar's complaint is frivolous. Except for the Title IX claim, the suit is premised on 42 U.S.C. § 1983, yet that statute does not authorize litigation against the states for violations of the Constitution or federal law, including treaty obligations. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Holton v. Ind. Horse Racing Comm'n*, 398 F.3d 928, 929 (7th Cir. 2005); *see also Jogi v. Voges*, 480 F.3d 822, 827-28 (7th Cir. 2007). Thus, a straightforward application of § 1983 resolves all but the Title IX claim, and the district court should have refrained from addressing the question of sovereign immunity. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779-80 (2000); *Holton*, 398 F.3d at 929. Moreover, Konar cannot state a claim under the Universal Declaration of Human Rights or the Vienna Declaration because both are non-binding declarations that provide no private rights of action. *See* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/ CONF.157/23 (July 12, 1993); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *Sosa v. Alvarez Machain*, 542 U.S.

692, 734 (2004) (explaining that Universal Declaration is simply a statement of principles and not a treaty or international agreement that would impose legal obligations); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 918 (2008) (noting that Vienna Declaration is "non-binding"). And to the extent that Konar claims a violation of Title IX in connection with a court ordered parenting class, he does not allege that an educational institution excluded him from participation, denied him benefits, or subjected him to sex discrimination within the context of the program itself, as would be necessary to state a claim under Title IX. *See* 20 U.S.C. § 1681(a); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999); *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 604-05 (7th Cir. 2008); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997).

Accordingly, the judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondent.

ORDER
No. 07 C 628
(Filed Aug 23, 2007)

DOCKET ENTRY TEXT

On May 31, 2007, this Court granted Defendant's Motion to Dismiss for Lack of Jurisdiction. Plaintiff was given leave to file an amended complaint, stating proper grounds for federal jurisdiction. The Court's order stated that the failure to do so would result in dismissal with prejudice. On June 21, 2007, Plaintiff filed an amended complaint, purporting to state the basis for federal jurisdiction. However, Plaintiff has not overcome the Eleventh Amendment's procedural bar as fully explained in the Court's order of May 31, 2007. Thus, for the reasons set forth in this Court's May 31, 2007, Plaintiff's Amended Complaint is dismissed with prejudice. Defendant's Motion to Dismiss the Amended Complaint [24] is granted. The status

hearing set for October 3. 2007, at 9:00 A.M. is vacated.

BY THE COURT:

/s/ John W. Darrah

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondent.

ORDER
No. 07 C 628
(Filed May 31, 2007)

DOCKET ENTRY TEXT:

For the reasons set forth below, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, stating the grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice. Status hearing set for June 6, 2007 at 9:00 a.m. is vacated and reset to August 21, 2007 at 9:00 a.m.

STATEMENT

Plaintiff, Daniel Konar, proceeding pro se, filed a Complaint against the Defendant, the State of Illinois. The gravamen of the Plaintiff's Complaint is his assertion that the Defendant conspired to take the minor son from his custody without a trial, a hearing, or due process in violation of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and other unnamed, civil rights statutes. The Complaint also asserts that the State of Illinois allowed the libel and slander of the Plaintiff. Plaintiff seeks injunctive relief and compensatory and punitive damages. Currently before the Court is the Defendant's Motion to Dismiss for Lack of Jurisdiction on the basis of state sovereignty.

The federal courts are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) have been entrusted to them by a jurisdictional grant by Congress. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.") The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895). Thus, it is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action

respecting the merits of the decision. *Cook v. Winfrey,* 141 F.3d 322, 325 (7th Cir. 1998).

Here, the Plaintiff has sued the State of Illinois. The Eleventh Amendment's sovereign immunity clause expressly precludes federal courts from exercising jurisdiction over any law or equity claims, unless a state consents to suit or unless Congress overrides the Eleventh Amendment by specifically legislating under constitutional grant of authority. *Tenn Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004); *Pennhurst St. Sch. V. Halderman*, 465 U.S. 89, 100-01 (1984) (*Pennhurst*). The sovereign immunity clause bars federal district courts from adjudicating suits brought by private litigants against states or their agencies. *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994) (Garcia); see also *Fayemi v. Pucinski*, 155 F. Supp.2d 944, 948 (N.D. Ill. 2001) ("the Eleventh Amendment bars federal courts from exercising jurisdiction over actions brought by a citizen against a state, a state agency, or state official").

Here, Plaintiff's suit appears to be brought under 42 U.S.C. § 1983. Generally, under 42 U.S.C. § 1983, a plaintiff may be granted relief where he has been deprived rights or privileges secured for him by the Constitution and law. The application of the statute is limited in scope in terms of who may be sued by a plaintiff and under what circumstances they may be sued. Thus, if Plaintiff's suit is brought under Section 1983, the Court lacks jurisdiction because the State of Illinois has not consented to be sued; and Plaintiff's Section 1983 claims present no

Congressional override of the general prohibition against suit against states. The Plaintiff, however, in his Response, denies that his suit was brought under Section 1983 and assets that he is suing directly under Amendments to the Constitution and pursuant to the general grant of jurisdiction to federal courts over federal questions, 28 U.S.C. § 1331. Plaintiff also asserts that the Defendant waived its immunity when, in the child custody proceeding before the Cook County Circuit Court, the Cook County judge "wanted to hear and did hear from an employee of School District 54" and "used that evaluation in the administration of the law of the State of Illinois" and ordered the child to be enrolled in a public school. Plaintiff asserts that such actions amount to a waiver of Eleventh Amendment immunity because the public school system is, in part, federally funded.

The Plaintiff's arguments do not change the underlying issue: the Court lacks jurisdiction over the Plaintiff's suit against the State of Illinois. Plaintiff's constitutional claims before this Court appear to be presented through 1983, which, for reasons stated above, do not warrant a waiver of sovereign immunity. Further, the Court's jurisdiction over federal questions, under Section 1331, does not abrogate the Eleventh Amendment. The Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 86 (1996), stated, "the underlying jurisdictional statute involved in this case, 28 U.S.C. § 1331, does not itself purport to direct federal courts to ignore a State's sovereign immunity." Thus, Plaintiff has not cited to any applicable federal

statute that abrogates sovereign immunity in this case. Further, there has not been a valid waiver of Eleventh Amendment immunity. *Pennhurst* and its progeny require that the state's consent to suit must be "unequivocally expressed." 465 U.S. at 99. Here, the Defendant, the State of Illinois, has not expressed its consent unequivocally.

For the foregoing reasons, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, if the Plaintiff can do so consistent with Federal Rule of Civil Procedure 11, stating proper grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice.